Supreme Court, U.S.
FILED
JUL 6 1995
CLERK

(10)

No. 94-1140

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

44 LIQUORMART, INC. and
PEOPLES SUPER LIQUOR STORES, INC.,
Petitioners,

v.

STATE OF RHODE ISLAND and
RHODE ISLAND LIQUOR STORES ASSOCIATION,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF AMICI CURIAE THE BEER INSTITUTE, THE DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC. AND THE WINE INSTITUTE IN SUPPORT OF PETITIONERS

JOHN J. WALSH *
STEVEN G. BRODY
MARY ELIZABETH TAYLOR
CADWALADER, WICKERSHAM & TAFT
100 Maiden Lane
New York, NY 10038
(212) 504-6000
Counsel for Amici Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

3109

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. THE FIRST CIRCUIT MISCONSTRUED SECTION 2 OF THE TWENTY-FIRST AMENDMENT BY IGNORING BOTH ITS UNAMBIGUOUS LANGUAGE AND ITS LEGISLATIVE HISTORY 7

A. The Unambiguous Language of Section 2 Bears No Relation to Rhode Island's Price Advertising Ban 7

B. The Legislative History of Section 2 Shows That It Was Not Intended to Affect Any Constitutional Provision Other Than the Commerce Clause 8

1. *Prior to Prohibition, a Tension Developed between the States' Police Powers over Beverage Alcohol Products and the Federal Government's Commerce Clause Power* 8

2. *Section 2 Was Passed Solely to Remove the Restraint of the Commerce Clause from the States' Exercise of Their Police Powers over the Transportation and Importation of Beverage Alcohol Products* 11

II. THIS COURT HAS INTERPRETED SECTION 2 OF THE TWENTY-FIRST AMENDMENT AS RELEVANT ONLY TO CERTAIN COMMERCE CLAUSE CHALLENGES AND THE SEXUAL CONDUCT CASES 13

TABLE OF CONTENTS—Continued

Page

A. Even in the Area of Commerce Clause Challenges, this Court Increasingly Has Reduced the Significance and Scope of Section 2 13

B. This Court Repeatedly Has Held That the Twenty-first Amendment Has No Impact on Constitutional Provisions Other Than the Commerce Clause, and Particularly Not on the Bill of Rights and the Fourteenth Amendment 16

C. The Sexual Conduct Cases Are a Narrow Exception to this Court's Twenty-first Amendment Jurisprudence 20

III. THIS COURT'S DECISIONS IN *COORS* AND *CAPITAL CITIES CABLE* EVIDENCE THE PRINCIPLE THAT COMMERCIAL SPEECH RIGHTS ARE UNAFFECTED BY THE TWENTY-FIRST AMENDMENT 23

CONCLUSION 25

TABLE OF AUTHORITIES

CASES: Page

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 15
Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) .. 21
Bates v. State Bar of Ariz., 433 U.S. 350 (1977) .. 6
Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986) 15
California v. LaRue, 409 U.S. 109 (1972) .....*passim*
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 15-16
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) .....*passim*
Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980) 2, 18
City of Newport, Ky. v. Iacobucci, 479 U.S. 92 (1986) 14, 21
Cooper v. McBeath, 11 F.3d 547 (5th Cir.), *cert. denied*, 114 S. Ct. 2675 (1994) 15
Craig v. Boren, 429 U.S. 190 (1976) .....*passim*
Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964) 19
Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 21
Dunagin v. City of Oxford, Miss., 718 F.2d 738 (5th Cir. 1983) (*en banc*), *cert. denied*, 467 U.S. 1259 (1984) 2, 22, 23
Florida Bar v. Went For It, Inc., 1995 WL 365648 (June 21, 1995) 6
Healy v. Beer Institute, 491 U.S. 324 (1989) 15
Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) 14-15
Indianapolis Brewing Co. v. Liquor Cont. Comm'n, 305 U.S. 391 (1939) 14
James Clark Distilling Co. v. Western Md. Ry. Co., 242 U.S. 311 (1917) 10
Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) 5, 16, 17
Leisy v. Hardin, 135 U.S. 100 (1890) 9
Mandel v. Bradley, 432 U.S. 173 (1977) 18
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 19

TABLE OF AUTHORITIES—Continued

	Page
Michigan Beer & Wine Wholesalers Ass'n v. Attorney Gen., 370 N.W.2d 328 (Mich. Ct. App. 1985), *cert. denied*, 479 U.S. 939 (1986)	22
Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)	17
Murdock v. Pennsylvania, 319 U.S. 105 (1943)	18-19
New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981)	21
Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n, 499 U.S. 117 (1991)	7
Norman's on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011 (3d Cir. 1971)	11
North Dakota v. United States, 495 U.S. 423 (1990)	16
Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984)	2-3, 18, 23
Pennsylvania State Police, Bur. of Liquor Cont. Enforcement v. Hospitality Invs. of Phila., Inc., 650 A.2d 854 (Pa. 1994), *petition for cert. filed*, 63 U.S.L.W. 3574 (U.S. Jan. 20, 1995) (No. 94-1247)	22-23
Queensgate Inv. Co. v. Liquor Cont. Comm'n, 433 N.E.2d 138 (Ohio), *appeal dismissed*, 459 U.S. 807 (1982)	18
Rhode Island Liquor Stores Ass'n v. Evening Call Pub. Co., 497 A.2d 331 (R.I. 1985)	23
Rhodes v. Iowa, 170 U.S. 412 (1898)	10
Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995)	*passim*
S & S Liquor Mart, Inc. v. Pastore, 497 A.2d 729 (R.I. 1985)	23
South Dakota v. Dole, 483 U.S. 203 (1987)	12, 19
State Bd. of Equalization of Calif. v. Young's Market Co., 299 U.S. 59 (1936)	14
324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987)	15
The License Cases, 46 U.S. 504 (1847)	8-9
United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977)	8

TABLE OF AUTHORITIES—Continued

	Page
United States v. Mississippi Tax Comm'n, 412 U.S. 363 (1973)	19
United States v. Mississippi Tax Comm'n, 421 U.S. 599 (1975)	19
Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)	6
Wilkerson v. Rahrer, 140 U.S. 545 (1891)	9-10
Wisconsin v. Constantineau, 400 U.S. 433 (1971)	5, 16, 17
Wise v. Tennessee Alco. Bev. Comm'n, No. 81-325-I (Tenn. Ct. App. Apr. 13, 1982)	22
Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939)	14
STATUTES & OTHER AUTHORITIES:	
U.S. Const. amend. XXI	*passim*
27 U.S.C. § 121 (1927 & Supp. 1995)	9
27 U.S.C. § 122 (1927 & Supp. 1995)	10
H.R. Rep. 1461, 62d Cong., 3d Sess. 1 (1913)	10
49 Cong. Rec. 4291-92, 4299, 4447 (1913)	10
76 Cong. Rec. 1622, 4138, 4141, 4143, 4171, 4172 (1933)	11-13
Laurence H. Tribe, *American Constitutional Law* § 6-24 (2d ed. 1988)	21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1140

---

44 LIQUORMART, INC. and
PEOPLES SUPER LIQUOR STORES, INC.,
Petitioners,

v.

STATE OF RHODE ISLAND and
RHODE ISLAND LIQUOR STORES ASSOCIATION,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF OF AMICI CURIAE THE BEER INSTITUTE, THE DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC. AND THE WINE INSTITUTE IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST [1]

Amici are the primary trade associations representing the producers and marketers of beverage alcohol products in the United States. As such, *amici* have a strong in-

---

[1] Written consent of all parties to the filing of this brief has been filed with the Clerk of the Court as required by Supreme Court Rule 37.

terest in reversal of the First Circuit's erroneous holding that the Twenty-first Amendment requires a "presumption in favor of the validity" of Rhode Island's ban on Petitioners' truthful, non-misleading price advertising. To the contrary, the Twenty-first Amendment does not create a separate, lower tier of First Amendment protection for those commercial entities that speak about beverage alcohol products. Like all other commercial speech, the advertising of *amici*'s members may not be restricted unless the government satisfies in full measure this Court's test originally set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) ("*Central Hudson*").

The Beer Institute represents over 250 members of the malt beverage industry. Beer Institute members produce 93 percent of the beer consumed in the United States. The Distilled Spirits Council of the United States, Inc. ("DISCUS") is the primary trade association representing producers and marketers of distilled spirits sold in the United States. DISCUS also represents many major importers of wine. The Wine Institute is an association of California winegrowers. Its members include more than 400 wineries and affiliated businesses, and produce approximately 75 percent of American wine.

If the First Circuit's misapplication of the Twenty-first Amendment is accepted, it would intolerably compromise the First Amendment rights of *amici*, their members and all other producers, marketers, wholesalers, retailers, and consumers of beverage alcohol products. The threat to those rights is real and reaches much farther than the price advertising ban at issue here, as evidenced by two other opinions that erroneously relied on the Twenty-first Amendment to uphold state restrictions on general advertising for beverage alcohol products. *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 750-51 (5th Cir. 1983) (*en banc*) (plurality opinion), *cert. denied*, 467 U.S. 1259 (1984) ("*Dunagin*"); *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 498 (10th Cir. 1983), *rev'd on*

other grounds sub nom. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (*"Oklahoma Telecasters"*). *Amici* accordingly urge the Court not only to reverse, but in doing so to make clear that the Twenty-first Amendment has no impact on commercial speech rights protected by the First Amendment.

SUMMARY OF ARGUMENT

The First Circuit erroneously relied on the Twenty-first Amendment to dilute this Court's *Central Hudson* test for reviewing Rhode Island's ban on truthful, non-misleading off-premises price advertising for beverage alcohol products.[2] Addressing *Central Hudson*, the First Circuit initially recognized that a State has the burden of proving that its restriction on commercial speech directly advances the asserted governmental interest. App. 5.[3] But the First Circuit then effectively reversed that burden, by mistakenly relying on a misinterpretation of this Court's holding in *California v. LaRue*, 409 U.S. 109, 118 (1972) (*"LaRue"*), that the Twenty-first Amendment requires an "added presumption" of validity in favor of certain state regulations. App. 5-6, 8. The First Circuit ignored the narrow applicability of the holding in *LaRue* and the careful analysis of the Twenty-first Amendment conducted by the district court, which correctly concluded that the "Amendment does not require a modification of either the level or allocation of the burden of proof in commercial speech cases involving the regulation of the sale of alcoholic beverages." App. 42.

---

[2] Although *amici* recognize that current law requires commercial speech restrictions to be reviewed under *Central Hudson*, they respectfully suggest that the Court instead should accord full First Amendment protection to truthful commercial speech such as Petitioners' price advertising. *See Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1594 (1995) (*"Coors"*) (Stevens, J., concurring in the judgment).

[3] The citation form "App. ——" refers to the appendix to the petition herein.

The First Circuit's reliance on the Twenty-first Amendment to reduce free speech rights is contrary to the unambiguous language of that Amendment. Section 1 of the Amendment repealed the Eighteenth Amendment and thereby ended Prohibition. Section 2 of the Twenty-first Amendment, which is the provision at issue here, refers only to the enforcement of laws concerning the "transportation or importation into" a State of beverage alcohol products.[4] No reasonable construction of Section 2's language could embrace Rhode Island's ban on truthful price advertising.

Further, the First Circuit's application of Section 2 flies in the face of the legislative history of the Twenty-first Amendment. Section 2 was passed to remove the restraint imposed by the Commerce Clause on States that sought to remain "dry" by exercising their police powers to prohibit the transportation or importation of beverage alcohol products into their borders. The legislative history of Section 2 contains absolutely no evidence that the framers intended to affect any provision of the Constitution other than the Commerce Clause, let alone the precious freedoms guaranteed by the Bill of Rights and the Fourteenth Amendment.

This Court's decisions adhere to the Twenty-first Amendment's express language and legislative history by generally limiting its impact to the Commerce Clause. Even in that context, the Court has diminished the significance of Section 2 during the past three decades, a shift at odds with the First Circuit's erroneous expansion of Section 2's influence into the free speech area. Most important, the Court repeatedly has held that Section 2 has no impact on various individual constitutional rights.

---

[4] Section 2 of the Twenty-first Amendment reads as follows:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const. amend. XXI.

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) ("*Larkin*") (Establishment Clause rights); *Craig v. Boren*, 429 U.S. 190 (1976) ("*Craig*") (equal protection rights); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) ("*Constantineau*") (due process rights).

The First Circuit ignored those cases and erroneously relied on the narrow exception that this Court created in *LaRue*, 409 U.S. at 118, to uphold a ban on " 'performances' that partake more of gross sexuality than of communication" on premises licensed to sell beverage alcohol products. This Court has never applied *LaRue* beyond its unique context. The First Circuit erred by implicitly equating the constitutional value of the gross sexual conduct in *LaRue* with that of Petitioners' truthful, nonmisleading price advertising. Indeed, in *Coors*, 115 S. Ct. 1585, this Court expressly refused to extend the reasoning of *LaRue* to the commercial speech context. *Id.* at 1589-90 n.2.

Coors is one of two decisions by this Court that invalidated restrictions on commercial speech concerning beverage alcohol products. The other is *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) ("*Capital Cities Cable*") (decided on the basis of federal preemption). Although those decisions do not directly address the precise Twenty-first Amendment question at issue, they evidence the First Circuit's error in interpreting the Twenty-first Amendment as having relieved the States of the restraints placed on them by the First and Fourteenth Amendments. For example, the *Coors* Court held that state regulations on commercial speech concerning beverage alcohol products are "subject, of course, to the same First Amendment restrictions that apply to the Federal Government." 115 S. Ct. at 1591.

The First Circuit seriously underestimated the significance of Petitioners' commercial speech rights. Constitutional protection of commercial speech stems from the recognition of its unique role in the development of consumer

awareness in a free enterprise economy. *Coors*, 115 S. Ct. at 1589. As this Court stated less than three months ago, "a 'particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate.'" *Id.* (*quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976)). Two seminal commercial speech decisions, *Virginia Pharmacy* and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), struck down price advertising bans imposed on licensed professions—pharmacists and lawyers—much like the ban imposed by Rhode Island on the beverage alcohol industry.[5] The Twenty-first Amendment simply cannot justify Rhode Island's decision to prohibit Petitioners from communicating the prices of their lawful goods to interested consumers.

The Twenty-first Amendment issue here is not about States' rights. Rather, the issue is whether the constitutional guarantee of free speech should have the same meaning at all levels of government. *Amici* submit that no government—state or federal—has the right to prohibit truthful, non-misleading commercial speech unless it can satisfy in full measure this Court's *Central Hudson* test. The First Circuit erred by relying on the Twenty-

---

[5] In *Florida Bar v. Went For It, Inc.*, 1995 WL 365648 (June 21, 1995), this Court reaffirmed its earlier decisions that struck down paternalistic bans on speech. The Court carefully distinguished Florida's restriction, which it upheld, from restrictions that have been "motivated primarily by paternalism." *Id.* at *10 n.2. Rhode Island's ban on truthful price advertising falls squarely within the latter category, as it mirrors the ban in *Virginia Pharmacy*, which the Court struck down because of its "highly paternalistic approach" of keeping consumers in ignorance. 425 U.S. at 770.

The Court in *Florida Bar* also underscored the independent obligation of the courts to "scour" the record when reviewing restrictions on commercial speech. *Id.* at *6. *Amici* submit that any proper, independent "scouring" of the record, like that conducted by the district court, would have concluded that Rhode Island had not met its evidentiary burden.

first Amendment to dilute that test. Its decision should be reversed.

ARGUMENT

I. THE FIRST CIRCUIT MISCONSTRUED SECTION 2 OF THE TWENTY-FIRST AMENDMENT BY IGNORING BOTH ITS UNAMBIGUOUS LANGUAGE AND ITS LEGISLATIVE HISTORY

The First Circuit misinterpreted and misapplied the Twenty-first Amendment by concluding that it was "precisely in order" to use a "presumption" of validity derived from that Amendment in favor of Rhode Island's ban on price advertising. App. 8. As made plain by both the language and the legislative history of the Twenty-first Amendment, its framers had no intention of affecting rights guaranteed by the Bill of Rights and the Fourteenth Amendment. Rather, the only constitutional provision (other than the Eighteenth Amendment) that the framers sought to affect was the Commerce Clause, by removing its restraint on a State's police power over the transportation and importation into its territory of beverage alcohol products.

A. The Unambiguous Language of Section 2 Bears No Relation to Rhode Island's Price Advertising Ban

Any interpretation of Section 2 of the Twenty-first Amendment must begin with its language. *See Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 128 (1991). But the First Circuit never quoted a single word from the Twenty-first Amendment. If it referred to the text, the First Circuit should have realized that the plain language of Section 2 has *no* application to Rhode Island's price advertising ban. *See Craig*, 429 U.S. at 206 (favorably quoting a treatise that states that the "text" of the Twenty-first Amendment does not suggest any qualification of individual rights).

The framers of Section 2 expresed their narrow intent in clear terms. Section 2 does not speak of state regula-

tion in general of beverage alcohol products; instead, it mentions only regulation of the "*transportation or importation into* any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors . . . ." U.S. Const. amend. XXI (emphasis supplied). By no stretch of the English language is Rhode Island's ban on truthful price advertising a regulation of the "transportation or importation into" Rhode Island of beverage alcohol products. Further, Section 2 contains no words that even hint at an intention to affect First Amendment rights—an intention of such grave significance that it should not be inferred by the courts.

Because the text of Section 2 unambiguously expresses the framers' limited intent, this Court need not consider Section 2's legislative history in order to reverse the First Circuit. *See United Air Lines, Inc. v. McMann*, 434 U.S. 192, 198-99 (1977). But if considered, that legislative history only reinforces the conclusion that the framers of the Twenty-first Amendment had no intention of affecting the protective sweep of the Bill of Rights and the Fourteenth Amendment.

B. The Legislative History of Section 2 Shows That It Was Not Intended to Affect Any Constitutional Provision Other Than the Commerce Clause

1. *Prior to Prohibition, a Tension Developed Between the States' Police Powers over Beverage Alcohol Products and the Federal Government's Commerce Clause Power*

The genesis of Section 2 of the Twenty-first Amendment must be analyzed in historical context. During our nation's first century, the Commerce Clause was not interpreted as a limitation on the States' police powers over the importation and sale of beverage alcohol products. *See Craig*, 429 U.S. at 205. As Chief Justice Taney wrote in dictum in 1847, ". . . I see nothing in the constitution of the United States to prevent [a State] from regulating and restraining the traffic, or from prohibiting it alto-

gether, if it thinks proper." *The License Cases*, 46 U.S. 504, 577 (1847).

But in 1890, the Court rejected Chief Justice Taney's dictum as too narrowly construing the reach of the Commerce Clause. *Leisy v. Hardin*, 135 U.S. 100, 118 (1890). The Court ruled that the Commerce Clause places the power to regulate interstate commerce in beverage alcohol products exclusively with Congress. *Id.* Because Congress had not regulated such commerce, the Court reasoned that Congress intended it to remain "free and untrammeled." *Id.* at 109-10. Consequently, a State may not exercise its police power over any beverage alcohol product shipped into the State from outside its borders, until that product loses its characteristics as interstate commerce by either removal from its original package or sale. *Id.* at 124-25.

The *Leisy* Court's interpretation of the Commerce Clause made it virtually impossible for "dry" States to prevent the importation and initial sale of any beverage alcohol product in its original package. The Court, however, did suggest a solution to this problem:

> [T]he responsibility is upon congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action.

Id. at 123-24.

Almost immediately after *Leisy*, Congress enacted the Wilson Act, which provided that a State could exercise its police powers over beverage alcohol products as soon as they arrived in that State. 27 U.S.C. § 121 (1927 & Supp. 1995). This Court upheld the Wilson Act in *Wilkerson v. Rahrer*, 140 U.S. 545 (1891), rejecting an argument that Congress had unconstitutionally delegated

its Commerce Clause power to the States. Rather, Congress had "imparted no power to the state not then possessed," but had "simply removed an impediment to the enforcement of the state laws . . . ." *Id.* at 564. The Wilson Act, however, proved ineffective to protect "dry" States because it did not remove the Commerce Clause's impediment on state regulation until after the packages had entered the State. *See Rhodes v. Iowa*, 170 U.S. 412 (1898).

To address the deficiency in the Wilson Act, Congress passed the Webb-Kenyon Act, which was intended "to withdraw the protecting hand of interstate commerce from intoxicating liquors." H.R. Rep. 1461, 62d Cong., 3d Sess. 1 (1913). The language of the Webb-Kenyon Act prefigures Section 2 of the Twenty-first Amendment:

> The shipment or transportation, in any manner or by any means whatsoever, of . . . intoxicating liquor of any kind, from one State, Territory, or District of the United States . . . into any other State, Territory, or District of the United States . . . intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States . . . is hereby prohibited.

27 U.S.C. § 122 (1927 & Supp. 1995). The Webb-Kenyon Act was passed over vigorous constitutional objection and President Taft's veto on constitutional grounds. *See* 49 Cong. Rec. 4291-92, 4299, 4447 (1913).

A divided Court upheld the Webb-Kenyon Act in *James Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311 (1917). As it had stated with regard to the Wilson Act, the Court held that the Webb-Kenyon Act did not delegate any powers to the States, "but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law." *Id.* at 325; *see id.* at 326. Two years after *James Clark*

Distilling, the Eighteenth Amendment was ratified, and the Prohibition era began, which made moot any question concerning the constitutionality of the Webb-Kenyon Act. The problem with protecting the "dry" States from importation of beverage alcohol products did not arise again until 1933, when Congress began debating the form of the Twenty-first Amendment which would end Prohibition.

2. *Section 2 Was Passed Solely to Remove the Restraint of the Commerce Clause from the States' Exercise of Their Police Powers over the Transportation and Importation of Beverage Alcohol Products*

This Court explained in *Craig* the intent of the framers of Section 2 of the Twenty-first Amendment:

> The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes. This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause.

429 U.S. at 205-06 (citations omitted); *see Capital Cities Cable*, 467 U.S. at 712; *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011, 1019 (3d Cir. 1971) ("A primary purpose of section 2 of the twenty-first amendment was to eliminate any problem the states might have in regulating liquor because of the doctrine of *Leisy v. Hardin* . . . .").

The Court's conclusion in *Craig* concerning the framers' intent is well-supported by the legislative history of the Twenty-first Amendment. The Resolution that became the Twenty-first Amendment originated in the Senate. Several Senators made plain that their concern was the sufficiency of the Webb-Kenyon Act to protect "dry" States from importation of beverage alcohol products. Senator Blaine, chairman of the subcommittee that held

hearings on the Resolution and floor manager of the Resolution in the Senate, stated,

> The committee felt that since the Congress had acted and had definitely legislated upon this question [by passing the Webb-Kenyon Act], while that legislation had been sustained by the Supreme Court, yet it was sustained by a divided court, and that we could well afford to guarantee to the so-called dry States the protection designed by section 2.

76 Cong. Rec. 4141 (1933); *see id.* (remarks of Senator Blaine) ("propos[ing] to write permanently into the Constitution a prohibition along that line [of the Webb-Kenyon Act]").

A similarly limited description of Section 2 was offered by Senator Borah, who was known as an "authoritative" advocate of Prohibition. *See id.* at 1622. He described Section 2 as "incorporating [the Webb-Kenyon Act] permanently in the Constitution of the United States." *Id.* at 4172; *see id.* at 4171 (remarks of Senator Wagner) ("[I]f the dry States want additional assurance that they will be protected I shall have no objection."); *id.* (remarks of Senator Robinson) ("I do not wish to ask the Senate to put itself in the position of denying any measure of protection to dry territory.").[6]

---

[6] On occasion, members of this Court have suggested that the purpose of Section 2 was to insulate the States from Commerce Clause challenges in areas of beverage alcohol regulation beyond importation and sale. *See, e.g., South Dakota v. Dole*, 483 U.S. 203, 218 (1987) (O'Connor, J., dissenting). This point is not germane here, as Petitioners challenge Rhode Island's price advertising ban under the First Amendment, not the Commerce Clause.

Further, we respectfully suggest that this more expansive view of Section 2 relies on a misinterpretation of Senator Blaine's statement that the "purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States." 76 Cong. Rec. 4143. Senator Blaine made that statement when advocating rejection of a proposed Section 3 to the Amendment, which provided that "Congress shall have con-

Most important for purposes of this case, the legislative history of the Twenty-first Amendment contains absolutely no evidence that the framers intended any impact on individual constitutional rights. As this Court has stated:

> Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked: "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned." P. Brest, *Processes of Constitutional Decisionmaking, Cases and Materials,* 258 (1975).

Craig, 429 U.S. at 206. The First Circuit erred by failing to consider either the language or the legislative history of the Twenty-first Amendment, both of which demonstrate that the framers had no intention to dilute any individual constitutional rights.

II. THIS COURT HAS INTERPRETED SECTION 2 OF THE TWENTY-FIRST AMENDMENT AS RELEVANT ONLY TO CERTAIN COMMERCE CLAUSE CHALLENGES AND THE SEXUAL CONDUCT CASES

A. Even in the Area of Commerce Clause Challenges, this Court Increasingly Has Reduced the Significance and Scope of Section 2

The First Circuit's expansive reading of the Twenty-first Amendment beyond its framers' intent is also at odds

---

current power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." *Id.* at 4138. When placed in that context, and in light of Senator Blaine's clearly expressed intent that Section 2 would constitutionalize the Webb-Kenyon Act, his "absolute control" language seems logically to mean that the States alone—not concurrently with Congress—should control the importation and sale of beverage alcohol products.

with the Court's post-1964 Twenty-first Amendment jurisprudence. During the past three decades, the Court increasingly has diminished the force of that Amendment in the one area that the framers intended to affect—challenges of state beverage alcohol regulations on Commerce Clause grounds. *See* App. 38 (district court opinion). As Justice Stevens noted in 1986, the Twenty-first Amendment "now has a barely discernible effect in Commerce Clause cases . . . ." *City of Newport, Ky. v. Iacobucci*, 479 U.S. 92, 98 (1986) ("*Iacobucci*") (citations omitted) (dissenting opinion).[7] With the Twenty-first Amendment playing a diminished role even in the Commerce Clause area, the First Circuit erred by expanding it to violate First Amendment rights.

In its earliest decisions interpreting the Twenty-first Amendment, the Court ruled that the Amendment broadly removed the Commerce Clause's restraint on state regulation of transportation and importation of beverage alcohol products. *See, e.g., State Bd. of Equalization of Calif. v. Young's Market Co.*, 299 U.S. 59 (1936) (upholding California license fee imposed on the privilege of importing beer into the State); *Indianapolis Brewing Co. v. Liquor Cont. Comm'n of Mich.*, 305 U.S. 391 (1939) (upholding Michigan's retaliatory statute prohibiting liquor importation from States which discriminated against beer manufactured in Michigan); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939) (upholding Kentucky's statute forbidding non-licensed common carriers from transporting liquor manufactured in that State).

In 1964, however, the Court issued its watershed decision in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), where it made clear that the

---

[7] Justice Stevens contrasted the Commerce Clause cases with the sexual conduct cases. *Id.* at 98-99. As discussed in Point II C, *infra*, the latter cases have been confined by the Court to their limited context.

Twenty-first Amendment did not supplant the Commerce Clause entirely in the area of beverage alcohol regulation:

> To draw a conclusion from [the Court's earlier Twenty-first Amendment] decisions that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* "repealed," then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect.

Id. at 331-32. *See Capital Cities Cable*, 467 U.S. at 712 (same); *Cooper v. McBeath*, 11 F.3d 547, 555 (5th Cir.) (noting the Court's shift away from its early broad reading of the Twenty-first Amendment), *cert. denied*, 114 S. Ct. 2675 (1994).

Since *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, the Court repeatedly has resolved conflicts between state regulation under the Twenty-first Amendment and federal authority under the Commerce Clause in favor of the Commerce Clause. *See Capital Cities Cable*, 467 U.S. 691 (invalidating State's ban on beverage alcohol advertising as applied to federally regulated cable television systems); *Healy v. Beer Institute*, 491 U.S. 324 (1989) (invalidating State's price affirmation statute); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987) (holding that the Twenty-first Amendment does not prevent application of the Sherman Antitrust Act); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986) (invalidating State's price affirmation statute); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (invalidating State's statutory exemption of locally produced liquor from excise tax on wholesale liquor sales); *Cali-*

fornia Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (same as *324 Liquor Corp.*).[8]

This Court's decisions during the past 30 years demonstrate the limited applicability of the Twenty-first Amendment to a State's use of its police powers, even in the one context where it was intended to operate—easing the restraint of the Commerce Clause. Those decisions underscore the First Circuit's error in applying that Amendment to enhance state power and reduce constitutional rights in a context—free speech—where it is wholly irrelevant.

B. This Court Repeatedly Has Held That the Twenty-first Amendment Has No Impact on Constitutional Provisions Other Than the Commerce Clause, and Particularly Not on the Bill of Rights and the Fourteenth Amendment

The First Circuit disregarded three of the Court's decisions that speak most directly to the issue of whether the Twenty-first Amendment affects individual constitutional rights. *See Larkin*, 459 U.S. 116; *Craig*, 429 U.S. 190; *Constantineau*, 400 U.S. 433. Those decisions, which were correctly relied on by the district court (App. 38-39), squarely hold that the Twenty-first Amendment does not weaken rights guaranteed by various provisions of the Bill of Rights and the Fourteenth Amendment. Further, those three decisions are consistent with additional decisions of this Court that have refused to extend the influence of the Twenty-first Amendment.

---

[8] Further evidence that the Court has confined the Twenty-first Amendment to the framers' original intent is provided by *North Dakota v. United States*, 495 U.S. 423 (1990). In upholding the application of North Dakota's reporting and labeling regulations to sales of liquor to federal military bases, the Court recognized that the regulations "[fell] within the core of the State's power under the Twenty-first Amendment," because the State sought to prevent diversion of liquor from military bases into the civilian market in that State. *Id.* at 432-33.

Larkin is especially persuasive here because it also involved a challenge based on the First Amendment to a restriction related to beverage alcohol products. 459 U.S. 116. There, the Court invalidated under the Establishment Clause a zoning ordinance that granted a church the power to veto applications for liquor licenses by proprietors whose premises were located within 500 feet of the church. The Court rejected an argument that the zoning ordinance was justified by the Twenty-first Amendment, noting that "[t]he State may not exercise its power under the [Twenty-first] Amendment in a way which impinges upon the Establishment Clause of the First Amendment." *Id.* at 122 n.5. No suggestion was made by the *Larkin* Court that the Twenty-first Amendment required a "presumption in favor of the validity" of the zoning regulation, notwithstanding that the government had brought to the Court's attention the existence of such a presumption in the sexual conduct cases. Brief of the State Appellants at n.30 in *Larkin.*

Similarly, the *Craig* Court ruled that the Twenty-first Amendment has no impact on equal protection rights. There, the Court struck down as invidiously discriminatory a State's statute prohibiting the sale of 3.2 percent beer to males under the age of 21 and females under the age of 18. After distinguishing the sexual conduct cases, the Court held "that the operation of the Twenty-first Amendment does not alter the application of equal protection standards that otherwise govern this case." 429 U.S. at 209; *see Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972) (enjoining enforcement of state liquor licensing law insofar as it required a private club to comply with the club's racially discriminatory constitution and by-laws; applying full equal protection analysis but, unlike *Craig,* not expressly addressing the Twenty-first Amendment issue).

In a third decision involving individual constitutional rights, the Court in *Constantineau* held unconstitutional a State's statute providing for the public posting, without

notice or hearing, of the names of persons who allegedly engaged in habitual excessive drinking. 400 U.S. 433. Again, the Court did not alter its scrutiny of a legislative infringement on individual rights merely because beverage alcohol products were involved.[9]

As discussed below, the Twenty-first Amendment also has had no impact on the Court's review of challenges to beverage alcohol regulations brought under provisions of the Constitution other than the Bill of Rights and the Fourteenth Amendment. Because those decisions involved constitutional provisions no more precious than the First Amendment, they compel the conclusion that the First Amendment also remained unaffected by passage of the Twenty-first Amendment. *See Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (suggesting that First

---

[9] This Court's summary dismissal in *Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E.2d 138 (Ohio), *appeal dismissed*, 459 U.S. 807 (1982), is not to the contrary. The precedential effect of summary dismissals is limited to "the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). The Ohio court upheld a much narrower ban than the one at issue here: Ohio expressly *permitted* price advertising for liquor (but not beer) in virtually every advertising medium unless it referred to "price advantage." *Queensgate Inv. Co. v. Liquor Cont. Comm'n*, 433 N.E.2d at 139 n.1. In so ruling, the Ohio court applied the Twenty-first Amendment only in connection with *Central Hudson*'s requirement that the government identify a substantial interest. Unlike the First Circuit, the Ohio court did not interpret the Twenty-first Amendment as altering the evidentiary burdens imposed on the government by the last two parts of the *Central Hudson* test.

The First Circuit did not rely on *Queensgate*, and expressed some confusion about that decision's precedential effect. App. 9. Another appellate court that considered a restriction on beverage alcohol advertising mistakenly interpreted *Queensgate* as standing for the proposition that "the Twenty-first Amendment in some way enhances a state's authority to regulate commercial speech concerning alcoholic beverages." *Oklahoma Telecasters*, 699 F.2d at 497. Accordingly, *amici* respectfully request the Court to clarify that its summary dismissal in *Queensgate* should not be interpreted as expanding state power under the Twenty-first Amendment in the context of the First Amendment's protection of commercial speech.

Amendment freedoms are in a "preferred position" in the constitutional scheme).

For example, in *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964), the Court applied the Export-Import Clause to invalidate Kentucky's tax on liquor imports from Scotland into warehouses in that State for distribution in the United States. The Court explained that it "has never so much as intimated that the Twenty-first Amendment has operated to permit what the Export-Import Clause precisely and explicitly forbids." *Id.* at 344. Similarly, the Court rejected an argument that the Twenty-first Amendment created limitations on Congress's constitutional spending power in *South Dakota v. Dole*, 483 U.S. 203. The Court upheld Congress's withholding of federal highway funds to States that did not set a minimum drinking age of 21. *Id.* at 206.

In *United States v. Mississippi Tax Commission*, 412 U.S. 363 (1973), the Court refused to expand the Twenty-first Amendment to insulate a State's attempted taxation of liquor sales to federal military bases. The Court held that the Twenty-first Amendment did not create an exception to Article 1, Section 8, clause 17 of the Constitution, which empowers Congress to "exercise exclusive Legislation" over certain federal enclaves. *Id.* at 378. When that case returned to the Court in *United States v. Mississippi Tax Commission*, 421 U.S. 599, 613-14 (1975), it ruled that the Twenty-first Amendment also did not affect the principle of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)—that the Constitution prohibits state taxation of a federal instrumentality. The Court stated that it is "a 'patently *bizarre*' and '*extraordinary* conclusion' to suggest that the Twenty-first Amendment abolished federal immunity as respects taxes on sales to the bases where the United States and Mississippi exercise concurrent jurisdiction . . . ." *United States v. Mississippi Tax Comm'n*, 421 U.S. at 614 (citation omitted; emphasis supplied).

In light of this Court's decisions, the unambiguous language of the Twenty-first Amendment and its legislative history, is it any less "bizarre" and "extraordinary" to conclude, as the First Circuit did, that that Amendment requires a "presumption in favor of the validity" of Rhode Island's restriction on Petitioners' free speech rights?

C. The Sexual Conduct Cases Are a Narrow Exception to this Court's Twenty-first Amendment Jurisprudence

The First Circuit relied on only one decision in purported support of its dilution of Petitioners' commercial speech rights—*LaRue*, 409 U.S. 109. App. 5-6. This Court, however, expressly refused to extend *LaRue* to the commercial speech context in *Coors*. 115 S. Ct. at 1589-90 n.2. In *Coors*, the Court invalidated the federal government's ban on disclosure of alcohol content on labels for malt beverages. The Court rejected the government's argument, based in part on *LaRue*, for "a far more deferential approach to restrictions on commercial speech concerning alcohol:"

> Nor does *LaRue* support the government's position. *LaRue* did not involve commercial speech about alcohol, but instead concerned the regulation of nude dancing in places where alcohol was served.

Id. (citation omitted).

A closer examination of the low-value conduct regulated in *LaRue* reinforces the *Coors* Court's decision. At stake in *LaRue* were " 'performances' that partake more of gross sexuality than of communication." 409 U.S. at 118. Indeed, the Court expressed doubt that most of the conduct that California sought to prevent had a sufficient communicative element to trigger an *O'Brien* analysis. *Id.* at 117-18. Contrary to the First Circuit's apparent view, the "bacchanalian revelries" at issue in *LaRue*, *id.* at 118, are not the constitutional equivalent of Petitioners' truthful price advertising. Commercial speech, which was not recognized as protected by the

First Amendment until after *LaRue*, may not be restricted unless *Central Hudson* is satisfied in full measure.

Unlike the First Circuit, this Court has limited the reasoning of *LaRue* to cases where States prohibit "expressive" acts in the form of simulated sex, nudity or topless dancing—claimed to be protected by the First Amendment—on premises licensed to sell alcohol. In that context—and *only* in that context—the Twenty-first Amendment has been deemed to confer an "added presumption in favor of the validity of the state regulation." *LaRue*, 409 U.S. at 118; *see Iacobucci*, 479 U.S. at 97; *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 718 (1981). In his dissenting opinions, Justice Stevens has criticized even that narrow exception to this Court's Twenty-first Amendment jurisprudence as "blatantly incorrect," *Bellanca*, 452 U.S. at 725: "[n]either the plain language nor a fair construction of the purpose of the Twenty-first Amendment lends any support to the Court's holding that the Twenty-first Amendment shields restrictions on speech from full First Amendment review." *Iacobucci*, 479 U.S. at 97.

Regardless of whether the sexual conduct cases should have been decided without reference to the Twenty-first Amendment, the *Coors* Court correctly found those cases irrelevant in the commercial speech context. Those cases are irrelevant because (1) they involved conduct "only marginally" within "the outer perimeters of the First Amendment," *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991), *and* (2) the regulations challenged in each were an exercise of police power to set the conditions for alcohol sales on licensed premises—nowhere else—and thus only indirectly regulated expressive activity, if any were in fact involved. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33 (1975); Laurence H. Tribe, *American Constitutional Law* § 6-24 at 478 n.15 (2d ed. 1988). As the district court noted when distinguishing *LaRue* and *Bellanca*, "[i]n the present action, we are not concerned with conduct or 'public acts' that

violate 'valid penal statutes,' but rather with pure speech that occurs off the licensed premises." App. 40.

Even prior to *Coors*, various courts and judges declined to apply the sexual conduct cases in the commercial speech context. *See Michigan Beer & Wine Wholesalers Ass'n v. Attorney Gen.*, 370 N.W.2d 328, 335 (Mich. Ct. App. 1985) ("[T]he Twenty-first Amendment does not require us to deal with restraints on freedom of speech any differently than we would if alcoholic beverages were not involved."), *cert. denied*, 479 U.S. 939 (1986); *Pennsylvania State Police, Bur. of Liquor Cont. Enforcement v. Hospitality Invs. of Phila., Inc.*, 650 A.2d 854, 857-60 (Pa. 1994) (Castille, J., dissenting), *petition for cert. filed*, 63 U.S.L.W. 3574 (U.S. Jan 20, 1995) (No. 94-1247); *Dunagin*, 718 F.2d at 755 (five dissenting judges incorporating prior panel opinion (701 F.2d 314, 330) that the Twenty-first Amendment does "not change the standard of review" for restrictions on commercial speech); *id.* at 753-54 (two concurring judges rejecting expansion of Twenty-first Amendment as "mischievous and insidious");[10] *see Wise v. Tennessee Alco. Bev. Comm'n*, No. 81-325-I (Tenn. Ct. App. Apr. 13, 1982) (unanimous opinion declaring beverage alcohol advertising ban unconstitutional under Tennessee Constitution; not reaching issue under federal constitution, but expressing skepticism in dicta that the Twenty-first Amendment "has any significant effect" upon commercial speech rights protected by the First Amendment).[11]

For the reasons discussed above, the few opinions that have weakened commercial speech rights in reliance on the sexual conduct cases are in error.[12] More specifically,

---

[10] The *Dunagin* court upheld the constitutionality of Mississippi's intrastate ban of beverage alcohol advertising—erroneously in our view—but only the plurality opinion, adopted by a six-judge minority, relied on the Twenty-first Amendment.

[11] The *Wise* decision is reprinted in the Appendix to the Petition in *Hospitality Investments*, No. 94-1247, at 98A-109A.

[12] *See Hospitality Invs.*, 650 A.2d at 856 (holding that *LaRue*, *Bellanca* and *Iacobucci* "clinched" its decision to apply a "reasonable

the First Circuit erred by applying *LaRue* to uphold Rhode Island's ban on Petitioners' truthful, non-misleading price advertising.

III. THIS COURT'S DECISIONS IN *COORS* AND *CAPITAL CITIES CABLE* EVIDENCE THE PRINCIPLE THAT COMMERCIAL SPEECH RIGHTS ARE UNAFFECTED BY THE TWENTY-FIRST AMENDMENT

This Court has given full consideration to only two cases involving restrictions on commercial speech concerning beverage alcohol products. *Coors*, 115 S. Ct. 1585; *Capital Cities Cable*, 467 U.S. 691. On both occasions, those restrictions were invalidated. *Coors* and *Capital Cities Cable* illuminate the First Circuit's misinterpretation of the Twenty-first Amendment.

In *Capital Cities Cable*, this Court recognized that a State's regulation of beverage alcohol advertising is at best weakly related to the Twenty-first Amendment. There, the Court struck down on federal preemption grounds Oklahoma's requirement that cable television operators delete advertisements for certain beverage alcohol products when retransmitting out-of-state signals within Oklahoma. 467 U.S. at 715. The Court held that Oklahoma's interest in restricting some (but not all) of such advertising was "modest," and engaged "only indirectly the central power reserved by § 2 of the Twenty-first Amendment—that of exercising 'control over whether to

---

relation" test rather than *Central Hudson* to a state ban on beverage alcohol price advertising); *Rhode Island Liquor Stores Ass'n v. Evening Call Pub. Co.*, 497 A.2d 331, 337 n.7 (R.I. 1985) (upholding same Rhode Island ban as challenged here; stating that the sexual conduct cases required it to "presuppose that the regulation is a legitimate exercise of legislative power"); *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729, 732 (R.I. 1985) (relying on sexual conduct cases to uphold same Rhode Island ban as challenged here); *Dunagin*, 718 F.2d at 750 (plurality opinion relying on the sexual conduct cases to create "presumption in favor of validity" of state ban on beverage alcohol advertising); *Oklahoma Telecasters*, 699 F.2d at 498 (same).

permit importation or sale of liquor and how to structure the liquor distribution system.'" *Id.* (citation omitted). Like Oklahoma's statute, Rhode Island's ban on price advertising is not an exercise of some power purportedly granted by the Twenty-first Amendment; rather, Rhode Island's ban is merely an unjustifiable exercise of its police power that violates the First Amendment.

This same point is made differently in *Coors*, where the Court rejected the federal government's argument that one purpose of its ban on alcohol content disclosure on malt beverage labels was to facilitate similar state regulations:

> Even if the Federal Government possessed the broad authority to facilitate state powers, in this case the Government has offered nothing that suggests that States are in need of federal assistance. States clearly possess ample authority to ban the disclosure of alcohol content—*subject, of course, to the same First Amendment restrictions that apply to the Federal Government.*

115 S. Ct. at 1591 (emphasis supplied).

Coors contradicts the idea, inherent in the First Circuit's ruling, that the Twenty-first Amendment somehow gave the States a greater power to regulate speech than possessed by the federal government, through a presumption of validity in favor of state regulations. *See* App. 5-6, 8. As discussed in Point I, *supra*, the framers of that Amendment expressed no intention to *give* the States any such power, but only to *remove* the restraint imposed by the Commerce Clause. The holding of the *Coors* Court that the federal and state governments are subject to the "same First Amendment restrictions" follows from the framers' intent, underscores the First Circuit's misinterpretation of the Twenty-first Amendment, and requires reversal in this case.

Coors and *Capital Cities Cable* evidence the principle that the Twenty-first Amendment does not weaken the First Amendment when a state regulation of beverage alcohol products touches upon speech. Those decisions are consistent with *Larkin*, *Craig* and *Constantineau*, where this Court held that the Twenty-first Amendment is irrelevant to and does not weaken other guarantees contained in the Bill of Rights and the Fourteenth Amendment. The First Circuit, which issued its decision before *Coors*, erred by relying on the Twenty-first Amendment to abrogate Petitioners' commercial free speech rights.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

JOHN J. WALSH *
STEVEN G. BRODY
MARY ELIZABETH TAYLOR
CADWALADER, WICKERSHAM
& TAFT
100 Maiden Lane
New York, NY 10038
(212) 504-6000
Counsel for Amici Curiae
* Counsel of Record